

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

REGIONS ASSET COMPANY,

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Plaintiff,

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VS:

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CIVIL ACTION NO.
2:06cv882-MHT

REGIONS UNIVERSITY, INC.

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Defendant.

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**MOTION TO PRECLUDE AVERY ABERNETHY FROM TESTIFYING ON
MATTERS CONTAINED IN A RECENTLY FILED SUPPLEMENTAL
EXPERT REPORT**

Comes now defendant and shows unto this Honorable Court as follows:

1. The court's Pretrial Order requires that plaintiffs furnish its expert report in accordance with Rule 26 to defendant on or before July 13, 2007.
2. The expert report of Avery Abernethy was furnished to defendant as required by the court's order and Rule 26.
3. The deposition of Avery Abernethy was taken on August 13, 2007, prior to the expiration of discovery.
4. The discovery cutoff date in this case was August 15, 2007.
5. Under cover of a letter dated October 11, 2007, plaintiffs served a seven page supplemental report of Avery Abernethy dated October 8, 2007. The supplemental report expresses new opinions; expresses a new basis for opinions; and seeks to rely upon the Declaration of Jim Jager, which itself was filed after the court's deadline for expert reports.

WHEREFORE, defendant move the court to enter an order precluding Avery Abernethy from testifying about those matters set forth in the attached supplemental report dated October 8, 2007.

/s/victor t. hudson

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2007 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

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/s/victor t. hudson

Supplement to the Report of Avery Abernethy for
Regions Asset Company, Regions Financial Corp., Regions Bank v. Regions University, Inc.

10/8/07

1. I have reviewed the Regions Awareness Survey of 2007, the telephone survey used to gather the data for the study, and the declaration of Jim Jager the President of New South Research. I have also reviewed the depositions of William Askew and Scott Peters. The 2007 report is very similar to the research reports conducted for Regions in earlier years. These reports are included in the materials supplied by Regions for this case.

2. As appears below, the surveys and reports by New South Research for Regions were done to support the advertising and marketing decisions of the company. These reports were conducted on a regular basis and not for the purposes of litigation. Hundreds of millions of dollars of advertising expenditures were evaluated in part based on these reports.

3. According to the deposition of William Askew, Head of Consumer Banking the brand awareness studies were done to "understand where our brand stood and the name "Regions", where it was in the top of mind awareness of the people because that's that's a very important factor in why they chose a bank." They were also done to help design advertising and track advertising results. Mr. Askew also stated that the brand awareness studies were used by the bank to "track our brand awareness in itself, how many people are aware of the name "Regions" and how many people over the years have been – and that awareness has gone up and up and up."

4. Mr. Askew stated that Regions employees with Ph.D's and Master's degrees in statistics would routinely review the survey procedures and sampling methods used by New South Research in the brand awareness surveys and in other surveys. Mr. Askew relied on these internal employee experts and was "comfortable and confident they did a good job."

5. According to the deposition of Scott Peters, Chief Marketing Officer of Regions, the survey research done by New South was used to assist the routine marketing and advertising decisions made by the bank. Regions employees provided input for research done by New South. Regions employees reviewed the sampling, survey design, and other aspects of consumer research performed by suppliers including New South Research.

6. The confidence that Regions had in the survey expertise of New South was considerable as evidenced by the regular and continued use of New South for "more than 10 years" according to William Askew. The aided and unaided recall of Regions and other marketing information was done for the short and long term management of the Regions brand, not for the purposes of litigation.

7. Based on my review of pre-2007 New South reports, the 2007 New South report, and the questionnaire used in the 2007 report, the marketing research and statistical methods used by

New South for Regions are reliable and valid. The telephone survey questions employed by New South are of the type commonly used to measure aided and unaided recall. Random digit dialing is a valid telephone survey methodology commonly used to generate a random sample. I have further confidence in the reliability and validity of pre-2007 New South reports because the methodology of the reports were reviewed on an ongoing basis by Regions employees with high levels of statistical training.

8. My review of the 2007 Regions/AmSouth Awareness and Perception Survey conducted by New South confirms my opinion that Regions has a very strong brand name. Unaided and aided recall of Regions is very strong in their market area. The telephone surveys were conducted in 12 markets (Birmingham, Mobile, Nashville, Memphis, Jackson, St. Louis, New Orleans, Indianapolis, Atlanta, Miami, Orlando and Tampa). Unaided and aided recall were highest in Birmingham, Mobile, Nashville, Memphis, Jackson, St. Louis, New Orleans and Atlanta. The highest scores were in Alabama and in States adjacent to Alabama.

9. Regions uses the word "Regions" as its name and brand and not the word "Region." "Regions" and "Region" are different words. In addition, the word "Region" combined with other words often refers to a specific geographic location.

10. The strength of a brand can be diluted in many ways from a marketing standpoint. Other companies using the same name dilutes the strength of a brand. When more consumers become aware of another company using the same name, the more likely the dilution is to occur.

The strength of a brand declines when it becomes diluted. A company no longer has sole control of the brand image. Consumer brand perceptions can be harmed. The brand is less distinctive. Brands that have become diluted often lose pricing power, have lower units sold, and have higher advertising costs.

All other things being equal, companies using the word "regions" outside of Region's Bank market area are unlikely to dilute the value of the Regions Brand from a marketing standpoint. This is because current and potential customers of Regions Bank are unlikely to encounter the use of "regions" by other companies in these circumstances.

Very small companies with a very limited market area, or companies doing no or minimal advertising to customers targeted by Regions are unlikely to cause a serious dilution of the Regions brand. If a current or potential Regions customer is not aware of the use of the word "Regions" as a mark by another company, then they will associate the use of the word "Regions" as a mark only with Regions bank.

11. A business incorporated using the word "regions" as part of their name does not mean that the company is active in the marketplace. Some companies that incorporate never actively conduct business. Other companies that incorporate stop doing business. A business may incorporate using a name and do a very minimal amount of business and come into contact with few people. For these reasons, simply having an incorporated business alone is a poor measure of business activity.

Similarly, someone may register a domain name on the world wide web and never put up

a web site. Or a web site may have such minimal traffic that it comes into contact with very few people. For these reasons, having a registered domain name alone using the word "regions" is a poor measure of business activity.

The yellow pages are a very broad measure of minimal business activity within a geographic area. When a company has a business phone listing, they automatically get a one line entry in the yellow pages. Without phone service, most businesses cannot generate enough customers to survive. A yellow page listing is a much better means of measuring minimal levels of business activity than a listing of businesses filing incorporation papers within a State.

12. The affidavit of Stephen Stricklin describes his search for businesses using "region" or "regions" in several individual States using yellowpages.com, 411.com, superpages.com and manta.com along with other "internet business information pages." This search was for companies in the individual States other than Regions Bank or Regions University. Stricklin also conducted phone interviews with companies identified in the initial search.

13. The following companies identified by Stricklin do not use "Regions" in their name and are not relevant:

A) In Alabama: Region Computer Services (Mobile) stopped using the name in 1997 or 1998. Additional such companies identified by Stricklin are: Gulf Region Information Technology Services, River Region Veterinary Services, River Region Home Inspections, River Region Productions, River Region Hospital and River Region Appraisals.

B) In Florida: Region Appraisal and Consulting Solutions; Regionalatlantic Reality; The Region Group and Region Trust.

C) In Illinois: Region Fence Sales and Region Realty

D) In Indiana: Region Datacom, Region Pools, Region Properties, Region Real Estate, The Designer Outlet & Region Liquidators, Region Chem-Dry and Region Idol.

E) In Louisiana: Region Realty of St. Tamany, Region Insulation, Region Security Insurance, Region Security Protection Agency. Region Security Protection Agency is also out of business.

F) In Missouri: Region Welding/Region Welding and Manufacturing and Region Land Survey.

G) North Carolina: Region Construction.

H) South Carolina: Region Properties

I) Tennessee: Region First Realty and Region Realty Group.

J) Texas: Region Enterprises

14. Because Regions Bank has their home offices in Alabama, has impressive unaided and aided recall in Alabama, and because Regions University is based in Alabama and draws more than 27% of their students from Alabama, I will review Stricklin's results from Alabama in detail.

Regions Propane has used the name "Thompson Gas" since 2003. Since the company is no longer using the word "regions" it does not currently dilute the Regions brand.

Several companies use the word "Regions" along with other words to refer to a

geographic area and are also highly unlikely to dilute the Regions brand (River Regions Reality and River Regions Developers).

15. According to Stricklin, the only businesses currently having yellow page listings using "regions" and not referring to a specific geographic region in Alabama or the parties are Regions Real Estate, Regions Construction Company, and Regions Pest Control. Based on Stricklin's affidavit:

a] Regions Real Estate has no employees, operates in one Alabama County (Foley), and has minimal sales (\$170,000 annually). This is a tiny business, doing limited advertising, and advertising/operating in a very limited geographic region. For these reasons, Regions Real Estate is unlikely to significantly dilute the Regions brand in the overall Regions market from a marketing perspective.

b] Regions Construction Company (Harvest, AL) does not advertise and is a very small business with only one employee. For these reasons, Regions Construction Company is unlikely to significantly dilute the Regions brand in the overall Regions market from a marketing perspective.

c] Regions Pest Control (Trafford, AL) is a very small business with sales in the \$300,000-\$400,000 range in four counties. Regions Pest Control does not have the revenues to support substantial advertising. It has a very limited geographic market area.

16. According to Stricklin the only company in the Arkansas yellow pages using "regions" other than the bank is Regions Contractors, Inc of Crawfordville, FL. Stricklin makes no mention of any consumer advertising of any sort by this company. Regions Contractors also has no permanent offices in Arkansas.

17. According to Stricklin, the firms in the yellow pages using the name Regions in Florida are Regions Beyond International; Regions Contractors (discussed in #16); Regions Aloft; Regions Facility Services; Regions Capital; Regions Insurance Consultants; and Regions Van Lines.

According to Stricklin, all of these companies are very small businesses. They market to very limited target audiences geographically, or to very narrow target audiences (such as restaurant owners). None of the companies were noted as doing any significant consumer advertising and none were noted doing radio or TV advertising. The largest company in terms of revenue was Regions Facility Services which targets owners and operators of commercial restaurants and advertises by having the "RFS" logo on their service trucks.

18. According to Stricklin, the firms in the yellow pages using "Regions" in their name in Georgia are Regions Hospitality, Regions Beyond Ministries, Regions Land and Investments, and Regions Development. Regions Development is no longer in business and cannot dilute the Regions Bank brand.

Regions Hospitality is in hotel management and does not run their hotels under "Regions Hospitality" as a consumer advertised brand.

Regions Beyond is a Christian mission outreach for a church in Columbus, GA and

Regions Land and Investment is a real estate brokerage with no employees in Colbert, GA. Both of these are small businesses and are in very limited geographic areas. None of the companies were noted as doing any significant consumer advertising and none were noted doing radio or TV advertising.

19. Stricklin identified no companies with the name "Regions" in the Illinois yellow pages outside of Regions bank.

20. According to Stricklin, Regions Communications is the only firm using "Regions" in the Indiana yellow pages. Information provided by Stricklin indicates that this company is a small businesses in very limited geographic area. It is not noted as doing any significant consumer advertising.

21. According to Stricklin, Regions Wholesale Battery, and All Regions Services are the only firms in the yellow pages of Louisiana using the name "Regions." All Regions Services also refers to geography and is not mentioned as doing any advertising by Stricklin. Regions Wholesale Battery is a very small businesses (\$62,000 in annual revenue) operating in a very limited geographic region and is not noted by Stricklin as doing any significant advertising.

22. According to Stricklin, Regions Realty Group and Regions Construction are the only companies advertising in the Mississippi yellow pages using the term "Regions." Regions Realty has changed their name to Phelps Realty Group and cannot be confused with Regions Bank. Regions Construction has one office, operates in a narrow geographic area, and is not mentioned as doing any consumer advertising by Stricklin.

23. In Missouri no companies were identified by Stricklin using the word "Regions" as part of their name in the yellow pages.

24. In North Carolina Regions Claim Management is the only company advertising in the yellow pages using "Regions" according to Stricklin. This is a small company and is not noted by Stricklin as doing any consumer advertising.

25. No South Carolina companies used "Regions" as part of their name in the yellow pages according to Stricklin.

26. According to Stricklin, in Tennessee Regions Development Group, Regions Hospitality, and Regions Contractors are the only companies using the word "Regions" as part of their name in the yellow pages. Regions Hospitality does not widely advertise the Regions name and advertises as Quality Inn. Regions Contractors was discussed previously. Regions Development Group is a small businesses with one office. None are noted by Stricklin as doing a significant amount of consumer advertising and none are noted as doing radio or television advertising.

27. Stricklin states that Region: Christian Center is the only firms in the yellow pages using the word "Regions" as part of its name in Texas. It is not mentioned as being a large business or doing significant consumer advertising.

28. Andrea Bender's affidavit states that she attempted to identify businesses with the trade name "Region" or "Regions" in Arkansas, Florida, Georgia, Illinois, Louisiana, Missouri, North Carolina and Texas. She started with Secretary of State records to identify business names. She then used internet business sources including yellowpages.com; superpages.com; manta.com and 411.com. She then attempted to contact the businesses by phone. Some of the companies she contacted overlap with Stricklin. Bender identified companies that Stricklin did not and vice-versa.

29. The companies identified by Ms. Bender in the following States not using "Regions" in their name are:

- a) Illinois: Region Metal, Inc.
- b) Indiana: Region Design Group; Region Signs, Inc; Region Sports Network; and Region Title.
- c) Missouri: Region Medical Equipment and Region Land Survey. Although Bender claims that Region Land Survey is actually "Regions Land Survey," she is contradicted by Stricklin. Because of the conflict, I googled the name "Region Land Survey" and found the company website: regionsurvey.com. Bender did not identify the name accurately.

30. Regions Beyond, Regions Commercial Park and Regions Forest Service are the only companies in Arkansas using the name "Regions" identified by Bender. Regions Beyond is a publisher of Christian literature with a very narrow target market (helping pastors and missionaries build their ministries). They have only one location. Bender makes no mention of the size of the company, their revenues, or number of employees.

Regions Commercial Park owns commercial property leased to two retailers. One of the retailers is the owner of Regions Commercial Park (Mr. Craft). This is a very small business with only one customer in a very limited geographic market. Bender makes no mention of any consumer advertising done by the company.

Regions Forest Service has one location. Bender gives no information of the number of employees, sales revenues and does not mention any consumer advertising done by the company.

31] Bender identifies Regions Center and Regions Title in Florida. Regions Center is a single industrial park with only 30 lots in one location. Their target market is not consumers. Bender makes no mention of any employees of the company or any advertising spending beyond one part of one small website that is not aimed at the consumer market. Regions Title is a small company with only 4 employees doing business title work and estate closings. They have one location and Bender does not mention that they do any advertising.

32] Bender identifies Regions Land and Investments in Georgia. Stricklin also identified this company. Both agree that they are a very small real estate agency with one office doing

minimal consumer advertising.

33] Bender identifies Regions American Café in Illinois. The restaurant is in Chicago and Regions does not do business in this city. According to the ATM/Branch Bank locator on the www.regions.com website, the bank does not have a location within 50 miles of Chicago. For this reason, dilution of the Regions brand is highly unlikely. Bender does not identify any other company using the name "Regions" in Illinois.

34] Bender found no companies using the name "Regions" in Indiana.

35] Bender identified Regions Community Behavioral Health Center in Louisiana. This is a outpatient mental health facility with three locations in the State. Bender makes no mention of any consumer advertising or the revenues of the company.

36] Bender found no companies using the name "Regions" in Missouri.

37] Regions Real Estate Services was the only company using the word "Regions" found by Bender in North Carolina. No advertising was noted by Bender aside from a white page listing. No revenues were mentioned. They do business in a very limited geographic market.

38] Regions Christian Center and Regions Oil & Gas were the only companies in Texas using the word "Regions" identified by Bender. Regions Christian Center is a church in one city in Texas doing minimal consumer advertising. Regions Oil & Gas is a very small oil drilling company targeting depleted oil properties in three States. Neither their web site nor Bender note that they do any consumer advertising.

Signature:



Avery M. Abernethy

Date: 10/8/07